

LOU ANN GODFREY
Claimant

COMMUNITY BLOOD CENTER
Respondent

ARGONAUT INSURANCE COMPANY
Insurance Carrier

ORDER

APPEARANCES

RECORD AND STIPULATIONS

¹ Board Members David Shufelt and Duncan Whittier recused themselves. Shortly before this case was heard, a third member of the Board unexpectedly retired and as a result, a third pro tem was appointed. It is also worth noting that Mr. Martin has previously represented Pro Tem Parkinson in a workers compensation matter. This fact was disclosed to the Board and opposing counsel at the hearing and Mr. Kubin announced that he had no objection to the potential conflict. The parties are to be commended on their professionalism and congeniality.

ISSUES

The Administrative Law Judge (ALJ) adopted the impairment rating offered by Dr. Jackson and awarded claimant a 15 percent whole body² functional impairment as a result of her work-related injury. The claimant appealed this finding and asserts the Award should be modified to reflect the 25 percent impairment assigned by Dr. Prostic. Claimant maintains Dr. Prostic's impairment rating is more credible and consistent with the requirements of the Kansas Workers Compensation Act (Act). In short, claimant maintains Dr. Jackson's rating does not comport with the provisions of the Act as it failed to take into account the permanency which remained after claimant's injury and accounted for solely the diagnosis attached to her injury. Conversely, respondent believes the Award should be affirmed as Dr. Jackson's impairment rating (15 percent) is consistent with the Act's requirement that the 4th edition of the *Guides* be used when rating an injured employee's impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is no dispute as to the facts and circumstances surrounding this claim which were accurately and succinctly set forth in the ALJ's Award. Rather than unnecessarily restating those underlying facts, the Board merely adopts the ALJ's recitation of the facts as its own.

The single issue to be considered in this appeal is the nature and extent of claimant's impairment which resulted from her compensable accident. Two physicians spoke to this ultimate issue and, not surprisingly, have differing opinions. Dr. Adrian Jackson, claimant's treating physician, performed a three-level cervical fusion. He ultimately released her to return to work on October 5, 2009. He assigned a 15 percent impairment as he concluded she fell within the DRE III category, based upon her symptoms post-injury but pre-surgery.³ According to Dr. Jackson, the *Guides*⁴ dictate that claimant's improvement following the surgery is not determinative of her impairment.⁵

² All ratings referenced in this Award are to the whole body.

³ Jackson Depo. at 7.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted. K.S.A. 44-510e(a).

⁵ Jackson Depo. at 9.

In contrast, Dr. Edward Prostic examined claimant (at her attorney's request) and opined that she sustained a 25 percent impairment as a result of her accident. His rating was not based upon the DRE criteria. Rather, he used the "range of motion" approach which, while contained within the *Guides*, is not the preferred method. The "range of motion" method necessarily involves taking measurements of the individual's ability to move and then translating those numbers into a rating. As Dr. Prostic explained, the DRE method is, in his view, unfair because it fails to account for the multi-level fusion claimant underwent as a result of her injury as well as her resulting limitations and the load factor now present on her spine as a result of the surgery.⁶ In short, Dr. Prostic's rating accounts for claimant's condition post-surgery while Dr. Jackson's rating accounts only for her diagnosis as a result of her accident. Indeed, Dr. Jackson admitted that he did not perform any range of motion tests upon claimant as he viewed them as irrelevant to the rating process under the terms of the *Guides*.⁷

The ALJ noted both physicians' testimony and reasoned as follows:

Two medical opinions from board certified orthopedic surgeons were offered as to the of the [sic] nature and extent of [c]laimant's permanent impairment. Both opinions have credibility. However, Dr. Jackson did perform [c]laimant's surgery and did more than one examination of the [c]laimant. His opinion is more indicative of [c]laimant's condition. For those reasons, the Court is finding that [c]laimant's permanent impairment is fifteen percent of the body as [a] whole.⁸

The Board has considered the parties' briefs and statements during oral arguments and finds the ALJ's Award should be modified. Obviously Drs. Jackson and Prostic have differing approaches to rating an injury such as claimant's. And both approaches have support in the *Guides*. The resulting differences are merely a reflection of each physician's approach to rating a patient's impairment and under these circumstances, the Board finds no error in their respective methods. Accordingly, the Board finds the Award should be modified to reflect a 20 percent permanent partial functional impairment to the whole body, thus recognizing the validity of both physicians' opinions and claimant's overall condition and limitations.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated June 28, 2010, is modified to reflect a 20 percent whole body functional impairment.

⁶ Prostic Depo. at 10-12.

⁷ Jackson Depo. at 9-10.

⁸ ALJ Award (June 28, 2010) at 4.

The claimant is entitled to 7.43 weeks of temporary total disability compensation at the rate of \$349.35 per week or \$2,595.67 followed by 83.00 weeks of permanent partial disability compensation at the rate of \$349.35 per week or \$28,996.05 for a 20% functional disability, making a total award of \$31,591.72.

As of October 15, 2010 there would be due and owing to the claimant 7.43 weeks of temporary total disability compensation at the rate of \$349.35 per week in the sum of \$2,595.67 plus 83.00 weeks of permanent partial disability compensation at the rate of \$349.35 per week in the sum of \$28,996.05 for a total due and owing of \$31,591.72, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of October 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge
Gary Terrill, Pro Tem Board Member
Stacy Parkinson, Pro Tem Board Member
E. Lee Kinch, Pro Tem Board Member